

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF WASHINGTON
AT TACOMA

3 DAVID JEREMY FOX,

4 Plaintiff,

5 v.

6 COWLITZ COUNTY, et al.,

7 Defendants.

CASE NO. C17-5471 BHS

ORDER ADOPTING REPORT
AND RECOMMENDATION AND
DENYING IN PART AND
GRANTING IN PART MOTION
FOR VOLUNTARY DISMISSAL

8 This matter comes before the Court on the Report and Recommendation ("R&R")
9 of the Honorable J. Richard Creatura, United States Magistrate Judge. Dkt. 18. Also
10 before the Court is Plaintiff's motion to withdraw his complaint. Dkt. 19.

11 On June 16, 2017, Plaintiff filed his complaint. Dkts. 1, 5. On July 20, 2017,
12 Plaintiff filed an amended complaint. Dkt. 11. On August 28, 2017, Defendants
13 answered. Dkt. 14. On November 2, 2017, Defendants filed a motion for summary
14 judgment. Dkt. 16. Plaintiff did not respond. On December 18, 2017, Judge Creatura
15 entered the R&R recommending that summary judgment be entered for Defendants. Dkt.
16 18.

17 Also on October 18, 2017, Plaintiff filed a motion to withdraw his complaint
18 without prejudice to his claims. Dkt. 19. On January 1, 2018, Defendants responded in
19 opposition to Plaintiff's motion. Dkt. 20

20 "A motion for voluntary dismissal should be granted unless the defendant shows it
21 will suffer some plain legal prejudice as a result." *United States v. Berg*, 190 F.R.D. 539,
22

1 543 (E.D. Cal. 1999). In determining whether a defendant has been prejudiced, courts are
2 to consider the following factors:

- 3 (1) The defendant's effort and expense involved in preparing for trial;
- 4 (2) Excessive delay and lack of diligence on the part of the plaintiff in
prosecuting the action;
- 5 (3) Insufficient explanation of the need to take a dismissal; and
- 6 (4) The fact that summary judgment has been filed by the defendant.

7 *Id.* Defendants acknowledge that the first factors do not weigh in favor of denying the
8 voluntary dismissal. Dkt. 20 at 2. Instead, Defendants argue that they will suffer
9 prejudice because Plaintiff's explanation for his need to withdraw the complaint is
10 purportedly insufficient and their summary judgment motion preceded the motion to
withdraw. *Id.* at 2–3.

11 The Court rejects Defendants' argument that Plaintiff's explanation for the
12 requested withdrawal is insufficient. Plaintiff had been incarcerated at a location where
13 he does not have access to legal materials necessary to adequately prosecute his claims.
14 Dkt. 19. Because he will serve only one year, it is likely in his best interest to preserve his
15 claims for a later date when he will no longer be in custody. This will also facilitate his
16 ability to utilize evidence he has already purportedly gathered in support of his claims.

17 However, the Court notes that Plaintiff did fail to file his request until a significant
18 time had passed since Defendants filed their motion for summary judgment. Moreover,
19 Plaintiff's amended complaint simply cannot support a viable claim that withstands the
20 arguments set forth in the summary judgment motion. The summary judgment motion
21 establishes that (1) Plaintiff has failed to state a claim against the County under *Monell v.*
22 *Department of Social Services*, 463 U.S. 658 (1978), and (2) Plaintiff's claims against

1 Defendants Jurvakainen and Brittain are conclusively barred by prosecutorial immunity.
2 *See* Dkts. 11, 16, 18.


3 Due to the nature of the arguments advanced in the summary judgment motion and
4 the recommendations in the R&R, the Court will take an intermediate approach in
5 handling Plaintiff's motion to withdraw the complaint. While the claims against
6 Jurvakainen and Brittain cannot be cured by amended pleadings, this does not mean that
7 Plaintiff could not cure his claim against the County with additional amended pleadings
8 and discovery. Accordingly, the Court will allow Plaintiff to voluntarily dismiss his
9 claims against the County without prejudice. However, as the claims against Defendants
10 Jurvakainen and Brittain cannot be cured, those claims will be dismissed with prejudice.

11 The Court having considered the R&R, Plaintiff's objections, and the remaining
12 record, does hereby find and order as follows:

- 13 (1) The R&R is **ADOPTED**;
- 14 (2) Plaintiff's claims against Defendants Jurvakainen and Brittain are
15 **DISMISSED with prejudice**;
- 16 (3) Plaintiff's claims against the County are **DISMISSED without prejudice**.

17 The Clerk shall enter judgment in favor of Defendants and close this case.

18 Dated this 1st day of February, 2018.

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20 
21 BENJAMIN H. SETTLE
22 United States District Judge